

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RICHARD VACCARIELLO on behalf of him- :
self and all others similarly situated, :
Plaintiff, : 08 CIV 5336 (CLB)
: .
- against - :
: .
XM SATELLITE RADIO INC., :
: .
Defendant. :
----- x

**DECLARATION OF ANTHONY J. DREYER
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

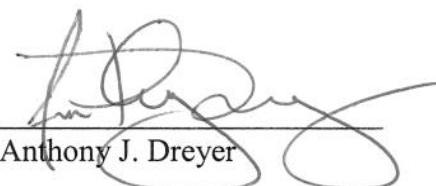
I, ANTHONY J. DREYER, being first duly sworn upon oath, state as follows:

I am a member of the law firm of Skadden, Arps, Slate, Meagher & Flom LLP. I make this declaration in support of the motion of defendant XM Satellite Radio Inc. ("XM") for dismissal of the plaintiff's complaint in the above-captioned matter.

1. Attached hereto as Exhibit A is a true and complete copy of XM's Customer Agreement with plaintiff Richard Vaccariello.
2. Attached hereto as Exhibit B is a true and complete copy of XM's March 21, 2008 letter to plaintiff notifying him that the pre-paid period for his XM radio subscription would renew on April 3, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 22, 2008
New York, New York



Anthony J. Dreyer

EXHIBIT A

THIS AGREEMENT CONTAINS THE TERMS OF YOUR USE OF XM SATELLITE RADIO SERVICES. IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE (OUR CONTACT INFORMATION IS LISTED BELOW). IF YOU DO NOT CANCEL YOUR SERVICE WITHIN 3 DAYS OF INITIATION OF YOUR SERVICE AND INSTEAD CONTINUE TO RECEIVE YOUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THAT THEY WILL BE LEGALLY BINDING ON YOU.

Thank you for choosing XM Satellite Radio ("XM"). XM broadcasts satellite radio programming only within the 48 contiguous United States. To become an XM subscriber, you must be at least 18 years old. If you are not yet 18 years old, you may still use XM, but only if the account was created by your parent or guardian. This is your copy of the XM Satellite Radio Customer Agreement. Please keep it for your records.

CONTACTING XM SATELLITE RADIO:

You may contact us between the hours of 6:00 am and 12:00 pm Eastern Standard Time Monday through Saturday and 8:00 am and 8:00 pm Eastern Standard Time, Sunday, by calling **1-800-XM-RADIO** (1-800-967-2346), or by writing to:

XM Satellite Radio Inc.
 Attention: Listener Care
 1500 Eckington Place, N.E.
 Washington, D.C. 20002
 Listener Care Center email address: listenercare@xmradio.com
 Website address: www.xmradio.com

1. OUR SERVICE

- a) Programming. The Service consists of (i) 100 channels of music, news, talk, sports, children's and other entertainment, as well as certain premium channels available for an additional fee, (ii) 21 channels of traffic and weather in 2004, and (iii) certain data-related services. XM reserves the right to change programming at any time and without notice, at our sole discretion, including canceling, moving or adding particular channels, with or without notice to you. If you are dissatisfied with the modified programming, you may terminate your service with notice to XM as outlined in Section 6. Premium channels are only available in commercial establishments at XM's discretion.
- b) Use Limitations. You may not reproduce, rebroadcast, or otherwise transmit the programming, create unauthorized recordings of the programming, charge admission specifically for the purpose of listening to the programming, or distribute play lists of the Service. Notwithstanding the provisions of Section 9, we or any of our programming partners may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction, under the rules and regulations of the FCC, and other applicable laws. Subscription to the Service does not grant you the right to use any of our or our partners' trademarks.
- c) User Safety. If you use the Service it is your responsibility to exercise prudent discretion and observe all safety measures required by law and your own common sense. You assume the entire risk related to your use of the Service. XM assumes no responsibility for accidents

resulting from or associated with use of the Service. Your Service includes traffic and weather information, and you acknowledge that such information is not for "safety for life", but is merely supplemental and advisory in nature, and therefore cannot be relied upon as safety-critical in connection with any aircraft, sea craft or automobile usage. This information is provided "as is" and XM disclaims any and all warranties, express and implied, with respect thereto or the transmission or reception thereof. XM further does not warrant the accuracy, reliability, completeness or timeliness of the traffic and weather information disclosed on the Service. In no event will XM, its data suppliers, service providers or hardware manufacturers be liable to you or to any third party for any direct, indirect, incidental, consequential, special, exemplary or punitive damages or lost profits resulting from use of or interruptions in the transmission or reception of the Service.

d) Stock Ticker Usage (only applicable with certain XM receivers). Certain stock quote data on the Service is the intellectual property of the relevant provider or third parties that provide such data to the relevant provider. All data is delayed by approximately 25 minutes. The data is protected by copyright and other intellectual property laws and all ownership rights remain with the relevant information service provider. All stock quotes with 4 or 5 character symbols are NASDAQ traded companies.

You may only use stock quotes retrieved from the Service for your own personal and non-commercial purposes. You may not sell or otherwise make any stock quotes available to anyone else. You bear all risk from any use or results of using any stock quotes.

Transmission of stock quotes may be subject to arbitrary delays beyond our control. Neither XM nor any stock quote provider warrants the accuracy, reliability, completeness or timeliness of the stock quote data. You acknowledge that neither any information service provider will be liable to you or any third party for any losses arising from such delay. In no event will any information provider or XM be liable to you for any loss or special, incidental, consequential, direct or indirect damages resulting from delay or loss of stock quotes on the Service.

e) Channel Blocking. Some programming may include explicit language. Channels with a high frequency of explicit language are indicated on your channel line-up and on the channel display with an "XL." It is your responsibility to impose listening restrictions that you consider appropriate on others. Please contact our Listener Care Center 1-800-XM-RADIO (1-800-967-2346), or visit our website xmradio.com for information on channel blocking.

f) Commercial Subscribers.

1. In addition to the other terms of this Agreement, this paragraph applies if you use the Service in a commercial establishment. Channels with a high frequency of explicit language are indicated on your channel line-up and on the channel display with an "XL." These channels may not be appropriate for the patrons of a commercial establishment. If you use the Service in a commercial establishment, you must inform us promptly of any complaints you receive from any patron about the content of our Service. It is your responsibility to impose listening restrictions that you consider appropriate on others and for your

patrons. Please contact our Listener Care Center **1-888-689-2300** or visit our website **xmradiocom** for information on channel blocking. We reserve the right to block any channels from a commercial establishment based on listener complaints, FCC inquiry, negative publicity, or similar factors.

2. If you use XM in a commercial establishment, you are not responsible for the payment of any copyright royalties to ASCAP, BMI, SESAC or for any sound recordings, as these are included in your subscription fee, unless you operate an establishment that charges an admissions fee (e.g. a theme park, skating rink, dance club, etc.), in which case you are responsible for payment of any copyright royalties to ASCAP, BMI, SESAC or for any sound recordings. Our subscription fees and other charges and fees are subject to change. Please do not include comments or questions with your payment. If paying against invoices, mail all payments to the following address:

XM Satellite Radio Inc.
P. O. Box 79500
Baltimore, MD 21279-0500

2. CHANGE IN TERMS.

Due to the evolving nature of our business, its competition, and the requirement and costs of programming suppliers, we reserve the right to change the terms on which we offer the Service from time to time, as we believe appropriate, including the fees and charges. If we make any such changes, we will send you a notice describing them and their effective date, in the manner described in Section 10(a), or we will send you an entirely new Agreement to replace this Agreement. You always have the right to cancel the Service at any time if these terms are not acceptable to you. If you elect not to cancel your Service after receiving our notice of a change, your continued receipt of Service from us will constitute acceptance of the changed terms. If you notify us that you do not accept such terms, then we may cancel your Service as provided in Section 6.

3. SERVICE INTERRUPTIONS.

Service may be unavailable or interrupted from time to time for a variety of reasons, such as environmental or topographic conditions and other things we can't control. Service might also not be available in certain places (e.g., in tunnels, parking garages, or within or next to buildings) or near other technologies. Home, portable and office-based receivers function best when the antenna is placed in or near a south-facing window with a clear view of the sky. Even if your antenna is near a south-facing window, certain window treatments could interfere with reception. We are not responsible for any interruptions of Service that occur beyond our control.

4. RADIOS.

a) Authorized Suppliers. We do not make or install any of the equipment you may use to receive the Service ("XM Radios"). We only provide the Service. You must purchase your XM Radio, and any repairs, parts, installation or service for it, from authorized sellers or manufacturers. We are not liable for any damage to your vehicle or home

resulting from installation of any XM Radio. We do not warrant any XM Radios in any way whatsoever and are not responsible for the advertising, statements, practices, promises, services or warranties of such sellers or manufacturers. If you have any complaints about your Radio or your installation, you should direct them to your authorized seller, manufacturer or installer. Returns of XM Radios are subject to your authorized seller's or manufacturer's return policy.

b) Multiple XM Radios. If you add additional XM Radios to your account, you must purchase a separate subscription for each one (see Section 5). Such additional subscriptions may be eligible for reduced rates, which may be offered by XM from time to time.

c) Loss of Radio. You should report to XM and cancel your subscription if your XM Radio is lost, stolen, sold, transferred or otherwise removed from your possession without your permission. Otherwise you will continue to pay for the Service.

d) Technology. It is prohibited to copy, decompile, disassemble, reverse engineer or manipulate any technology incorporated in receivers compatible with the XM Satellite Radio system. Furthermore, the AMBE® voice compression software included in this product is protected by intellectual property rights including patent rights, copyrights, and trade secrets of Digital Voice Systems, Inc. The music, talk, news, entertainment, data, and other content on the Service is protected by copyright and other intellectual property laws and all ownership rights remain with the respective data service provider. You are prohibited from any export of the data (or derivative thereof) except in compliance with applicable export laws, rules and regulations. The user of this or any other software contained in an XM Radio is explicitly prohibited from attempting to copy, decompile, reverse engineer, or disassemble the object code, or in any other way convert the object code into human-readable form. The software is licensed solely for use within this product.

5. PAYMENT.

In return for receiving our Service, you agree to pay us as follows:

a) Subscription Fee. You will pay in advance, preferably by credit card, at the applicable consumer or commercial rates in effect at the time of payment, for any Service ordered for use with your XM Radio (including Service ordered by your children or other family members), with or without your permission, through all periods until the Service is canceled. You will be responsible for all subscription fees, other charges and fees and purchases under your account. Our subscription fees and other charges and fees are subject to change. Please do not include comments or questions with your payment. If paying against invoices, mail all payments to the following address:

XM Satellite Radio Inc.
P. O. Box 79500
Baltimore, MD 21279-0500

b) Billing Statements. If you elect to make automatic credit or charge card (i.e., Visa, MasterCard, American Express) or electronic funds payments, you will not receive monthly statements unless you request them. Statements are sent via electronic mail unless otherwise

requested. Statements will show:

- (1) payments, credits, purchases, and any other charges to your account;
- (2) the amount you owe us; and
- (3) the payment due date.

If you are not using an electronic method of payment, we will send you a statement for the print billing payment cycle period available when subscribing. Statements are not sent with a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle.

c) Administrative Fees. In order to minimize our monthly subscription fees, we may charge you one or more of the following fees, all of which are subject to change:

1. *Activation Fee*: For each XM Radio on your account, we may charge you a fee to activate, upgrade or modify your XM Satellite Radio service. The addition of premium channels may require an additional transaction fee. The fee is payable with your first subscription fee payment.
2. *Late Fee*: If we do not receive your payment by the billing due date we may charge you a late fee of up to \$5.00 per month or partial month until the delinquent amount is paid in full, subject to applicable law. We do not extend credit to customers and this late fee is not an interest charge. This fee is reasonably related to the actual expense we incur due to late payment and may be subject to limitations set forth by law in your state.
3. *Deposits*: If you wish to reactivate your Service after a deactivation for non-payment, you must pay your account in full and we may require a deposit before we reactivate your Service. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.
4. *Returned Payment Fee*: If any bank or other financial institution refuses to honor any payment of yours, we may charge you a collection fee that is the lesser of (i) \$20.00 (\$15.00 for residents of West Virginia); and (ii) the maximum amount permitted under applicable law. You acknowledge that this collection fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expense we incur due to unsatisfied payment.
5. *Invoice Fee*: If you elect to receive a paper copy of your invoice, we may charge you a fee of up to \$2.00 per invoice.

d) Questions About Your Statement. If you have a question about your Service or bill, or if you would like to change or reactivate your Service, call us **1-800-XM-RADIO** (1-800-967-2346), or write to listenercare@xmradio.com or regular mail at the address on the first page. We will respond to you as promptly as we can. If you write to us, please include the following information:

- Your name and account number;
- The dollar amount in question; and
- The details of your question.

Please do not include any payment with your correspondence. If you wish to dispute any charge, you must contact XM within 30 days after the date you receive the statement in question (see Section 9 "Resolving Disputes" for how to notify XM that you are disputing a charge): OTHERWISE YOU WAIVE YOUR RIGHT TO DISPUTE THE CHARGE. Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible deactivation of the Service.

e) Payments. You must pay in U.S. dollars, by check, money order, electronic funds transfer, or credit card. Please make checks payable to XM Satellite Radio Inc. We reserve the right to require payment via cashier's check or money order regardless of credit rating or any past practice. The outstanding balance is due in full each payment period. We may, in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. No "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us.

f) If You Don't Pay On Time. We expect you to pay your account balance on time. If you don't pay your account balance on time, we may deactivate your Service after any applicable grace period. If you purchased an annual subscription to any Service and your account is past due, we may convert your subscription to a quarterly or monthly subscription. If so, we will prorate your subscription and amounts owed to us and will apply your pre-payments to past due amounts and any remaining credit to future obligations.

g) Consents Regarding Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness, by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or non-payment to credit reporting agencies.

h) Change of Address or Credit or Charge Card Information. You must notify us immediately of any change in your name, mailing address, residence address, email address, telephone number or credit or charge card information.

i) Taxes. You will pay all taxes or other government fees and charges, if any, which are assessed based on your use of the Service and the billing address you provide to XM.

6. CANCELLATION

a) Term. The term of this Agreement is indefinite and Service will continue until canceled.

b) Your Cancellation. You may cancel Service by notifying us. This notice will become effective at the end of your billing cycle. You are responsible for payment of all outstanding balances accrued through that effective date. We (or the creditor or lessor of your vehicle, if your Subscription Fee is included in the amount financed or leased) will refund amounts you may have prepaid on a quarterly, annual or multi-year basis representing those months beyond the billing cycle month during which you cancelled your service. Fees attributable to certain promotional offerings or Service received during trial periods may not be refunded. Service credits will not be refunded in cash, but will be honored in the form of Service for the remaining length of the credit.

c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, breach of any other material provision of this Agreement or for any other reason. In such case, you will still be responsible for payment of all outstanding balances accrued through that effective date. You must comply with all of the terms and conditions of this entire Customer Agreement or we may cancel your Service.

7. CUSTOMER LIST.

You acknowledge and agree that we will have the right to make portions of our customer list available to carefully selected third parties that we believe offer products and services that may be of interest to you. However, if you prefer that we not provide your information to third parties, please contact us at **1-800-XM-RADIO** (1-800-967-2346). Notwithstanding the foregoing, we reserve the right to inform ASCAP, BMI, SESAC, and any other music royalty collection organization of your subscription for the purposes of confirming to them that you are not responsible for the payment of music royalties.

8. LIMITS ON OUR RESPONSIBILITY

a) DISCLAIMERS. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING THE SERVICE OR YOUR XM RADIO. ALL SUCH WARRANTIES OR REPRESENTATIONS (INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT) ARE HEREBY DISCLAIMED.

b) LIMITATIONS OF LIABILITY. WE ARE NOT RESPONSIBLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE USE OR PURCHASE OF ANY XM RADIO OR THE SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE. OUR TOTAL LIABILITY TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE, REGARDLESS OF THE CAUSE, WILL IN NO EVENT EXCEED THE AMOUNTS THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. YOU MAY HAVE GREATER RIGHTS THAN DESCRIBED ABOVE UNDER YOUR STATE'S LAWS.

9. RESOLVING DISPUTES.

In order to expedite and control the cost of disputes, you agree that any legal or equitable claim relating to this Agreement, or the Service (referred to as a "Claim") will be resolved as follows:

a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(c)) for at least 60 days after one of us notifies the other of a Claim in writing. To initiate a claim, you must send notice to the address on the first page of this Agreement. If XM initiates a claim, we will send our notice to the billing address on file with us.

b) Formal Resolution. Except as provided in Section 9(c), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules") that are in effect at the time the arbitration is initiated and under the rules set forth in this Agreement. If there is a conflict between the AAA Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. If you initiate an arbitration, you agree to pay a fee of \$125 or, if less and you tell us in writing, the amount that you would pay to initiate a lawsuit against us in the appropriate court of your state. We agree to pay any additional fee or deposit required by the American Arbitration Association in excess of your filing fee. We also agree to pay the costs of the arbitration proceeding up to a maximum of one-half day (four hours) of hearings. Other fees, such as attorney's fees, expenses or travel to the arbitration and the costs of a proceeding that goes beyond one-half day will be with AAA rules. The arbitration will be held at a location within 100 miles of your residence unless you and we both agree to another location. To start the arbitration, you or we must do the following things:

- (i) Write a demand for arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered;
- (ii) Send three copies of the demand for arbitration plus the appropriate filing fee to: American Arbitration Association, 601 Pennsylvania Avenue, N.W., Suite 700, Washington, D.C. 20004;
- (iii) Send one copy of the demand for arbitration to XM SATELLITE RADIO INC. In the arbitration proceeding, the arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. A court may sever any portion of this Section 9 that it finds to be unenforceable.

c) Exceptions. Notwithstanding the foregoing:

- (i) any dispute over the validity of either party's intellectual property rights or our licenses to operate our business;
- (ii) any Claim based on Section 9(b) above; and
- (iii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. §605, or the Electronic Communications Privacy Act, 18 U.S.C. §§2510-2521, may be decided only by a court of competent jurisdiction.

Nothing in this Agreement shall affect our ability to terminate your Service for non-payment of amounts owed to us when due. Furthermore, nothing in this Agreement will prevent us from bringing an action in a court of competent jurisdiction in order to collect any unpaid amounts.

10. MISCELLANEOUS

- a) Notice. Notices to you will be deemed given when deposited in the

mail or on the date that an email is sent. Mailed notices may be included in our statements or emails to you. We may also provide notice to you by telephone, which will be deemed given when a message is left with you or someone answering the telephone at your residence or commercial establishment. Your notices to us will be deemed given when we receive them at the address (regular or email) or telephone number set forth on the first page of this Agreement.

b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

c) Assignment of Account or Agreement. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including without limitation collection of unpaid amounts, in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

d) Other. This Agreement states our entire agreement. No salesperson or other representative is authorized to change it for you, although XM may modify it without prior notice to you (see Section 2). If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of this Agreement will remain enforceable. The specific terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU FOR CHOOSING XM SATELLITE RADIO.





CUSTOMER AGREEMENT

EXHIBIT B

Date: March 21, 2008
 Account No: 1-265376296
 Radio ID: VLRG30R5

Mr. Richard Vaccariello
 287 Bowman Ave.
 Purchase, NY 10577-2568

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Dear Mr. Vaccariello:

Thank you for being a valued member of the XM Nation®. And for giving us the opportunity to entertain you at home, at work, in the car and on the go.

We wanted to provide you with a friendly reminder that your subscription is set to automatically renew on 4/3/2008. Your renewal plan is:

Three-Year Plan @ \$359.64 — a savings of 23%!

If you'd like to save even more, here is a selection of plans to choose from. Remember—there are no obligations, so why not take advantage of the best savings possible:

Plan	You Pay	Effective Rate	Total Savings*	Save %*
Quarterly Plan	\$38.85	\$12.95/month	\$0.00	0%
1-Year Plan	\$142.45	\$11.87/month	\$12.95	8%
2-Year Plan	\$271.95	\$11.33/month	\$38.85	13%
3-Year Plan	\$359.64	\$9.99/month	\$106.56	23%
4-Year Plan	\$479.52	\$9.99/month	\$142.08	23%
5-Year Plan	\$599.40	\$9.99/month	\$177.60	23%

Action required! Our records indicate that your American Express has expired or is set to expire prior to your renewal date. Because you're on an automatic credit/debit payment plan, we need you to update your credit/debit card information immediately to avoid any interruptions in your XM service. Please contact XM Listener Care at 1-800-XM-RADIO (1-800-967-2346) to update your billing information. If you already have an XM eCare account, you can update your information online at www.xmradio.com by selecting "Your Account" at the top.

Thanks again. We appreciate your business.

Sincerely,

The XM Team

P.S. We've included an updated channel line-up plus tips for finding new channels (to the right). We hope you'll use them to continue to get the most out of your service.

*As compared to \$12.95 monthly rate. Taxes not included. Terms of XM's Customer Agreement apply.